IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-438

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM AND RUSSEL PEDERSON, *Petitioners,*

v.

BEULAH CHASE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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Pursuant to Rule 24(4) of the Rules of the Supreme Court, Petitioners submit the following materials in reply to Respondent's Brief in Opposition.

INTRODUCTION

Petitioners have demonstrated that the scope of § 465 is an issue of national importance. Pet. at 8. Respondent nowhere disputes the importance of this issue. In light of the expansive interpretation of this statute by the lower Federal courts, Petitioners seek review by this Court to properly resolve this issue and the others raised in the Petition. Moreover, the adverse impact of

the decision of the court below upon the municipality in which land was purchased and placed in trust necessitates review by this Court.

The City of New Town, North Dakota, has approximately 2,000 residents, twenty-five per cent (25%) of whom are Indian. The municipal boundaries of New Town are within the boundaries of the Fort Berthold Reservation.[1] Under the decision of the court below, the City must now provide certain municipal services

[1] Respondent argues that the boundaries of the reservation are irrelevant to the merits of this case. Br. in Oppos. at 4. As discussed by Petitioners, however, the Court of Appeals premised the jurisdictional foundation of its holding upon *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Pet. at 6, n. 1. The *Santa Rosa* decision involved attempted land use regulation of § 465 trust land within a reservation, and reservation boundaries played a critical role in determining whether the State was precluded from exercising jurisdiction. Rather than address Petitioners' argument that reservation boundaries play a similar role in this case, however, Respondent argues that "the existing decision on the Ft. Berthold Reservation boundaries is correct. *City of New Town* v. *United States*, 545 F.2d 121 (8th Cir. 1972)." Br. in Oppos. at 4. To support this conclusion, Respondent notes that in *Long Elk* v. *United States*, 565 F.2d 1032 (8th Cir. 1977), the court below "found no diminishment [of reservation boundaries] under the standards of [*Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)] of a reservation in North and South Dakota whose situation is similar in a number of respects to Ft. Berthold." *Id.* The comparison made by Respondent between the *Long Elk* situation and the Fort Berthold one is untenable. It is of course obvious that each reservation boundary case must be separately examined. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87, 89 (8th Cir. 1975). Further, even assuming that the validity of boundary cases is dependent upon the existence of similar factors in other such cases, it is to be noted that a truly comparable reservation boundary case has been recently decided, under the *Rosebud* standards announced by this Court, in favor of disestablishment. *United States* v. *Dupris*, No. CR77-30056-01 (D.S.D., June 29, 1978).

to § 465 trust beneficiaries. No such arrangement, however, was ever contemplated by Congress in enacting the Indian Reorganization Act. Indeed, as the Commissioner of Indian Affairs, who was the primary administration spokesman and co-author of the Act, stated:

> By placing trust-barriers around Indian property, we exempted his land from State and local taxation. . . . States and local communities cannot furnish services without revenue. Once again, then, it becomes necessary for the Federal Government to assume an obligation toward the Indian tribes whose property it was seeking to protect.

Ann. Rep. of Sec'y. of Int. at 248 (1938). Although the Respondent offered to reimburse the City for water and sewer services, these services were denied because Respondent's land could not be assessed for collection of delinquent service charges. Petitioners are now required to provide these services although those who enacted § 465 never anticipated that agency officials would not seek to insure reimbursement to municipalities whose lands have been taken from their tax rolls.

The decision of the Court of Appeals can only serve as a greater impediment to the operations of the City of New Town. The jurisdictional problems confronted by the City from its location within a reservation are already of a debilitating nature. The severity of those problems, however, has been increased by the Secretary of the Interior. The City has, for example, been advised of an adverse impact on its municipal bond rating stemming from its inability to collect delinquent service charges on § 465 trust tracts.

Petitioners have illustrated that such administrative action is not of a unique nature. Pet. at 8. Further, the proposed new regulations concerning trust acquisition,

discussed *infra,* neither require that the Secretary assess the needs of those applying for trust lands, nor consider the jurisdictional impact of trust acquisitions upon States and their local governmental subdivisions. This situation will continue unabated until this Court properly limits the actions of the Secretary of the Interior.

I. PETITIONERS' CHALLENGE TO THE STANDARD OF REVIEW EMPLOYED BY THE COURT BELOW IS APPROPRIATELY RAISED IN THIS COURT.

Respondent argues that the Petitioners' challenge to the Court of Appeals' interpretation of 25 U.S.C. § 465 "is not appropriately presented for review by this Court". Br. in Oppos. at 3. This result is said to follow from Petitioners' attempt to seek a facial interpretation of § 465 in the courts below. *Id.* Respondent's characterization of Petitioners' challenge to agency action is without foundation. The instant suit was initiated on October 10, 1975. Respondent's Motion for a Preliminary Injunction was denied on December 20, 1975. Pet. at 14a. In the District Court's Memorandum Opinion, the Respondent's "right" under § 465 was eliminated as an issue in the case under the court's analysis of § 1983. Pet. at 18a. Although reference was made to § 465 in the Memorandum Opinion denying Respondent's Motion for a Permanent Injunction, (Pet. at 25a), the District Court had primarily viewed the case as one requiring an Equal Protection analysis. For the Petitioners to have attempted to create an administrative record in light of the District Court's disposition of the § 465 issue would have been without purpose.

Judicial review of agency action was not in issue in the District Court. Such review became an issue in the

Court of Appeals, however, when § 1983 was said to create a cause of action for violations of Federal statutory rights. Pet. at 7a. At that point, agency action taken pursuant to § 465 was properly reviewable. Instead of basing judicial review of agency action upon the administrative record and, thus, remanding the case to the District Court, the court below essentially conducted a *de novo* review of the propriety of the acceptance in trust under § 465. Such action was clearly prohibited under the decisions of this Court. Pet. at 9-11.

II. THE PROPOSED REGULATIONS OF THE DEPARTMENT OF THE INTERIOR REGARDING LAND ACQUISITIONS MERELY CONTINUE THE AGENCY PRACTICE CHALLENGED BY PETITIONERS.

Respondent asserts that the new regulations pertaining to 25 U.S.C. § 465, which have recently been proposed by the Secretary of the Interior, will supersede the administrative standards at issue in the present case. Br. in Oppos. at 3-4. In fact, examination of the proposed regulations, 43 Fed. Reg. 32311 (1978), reveals that they are no more than a proposed codification of the existing standards now in use by the Department of the Interior, and purportedly applied in the present case.

The fact that the proposed regulations are identical to the current administrative standards is most easily revealed by a comparison of the standards outlined in *City of Tacoma* v. *Andrus,* No. 77-1423 (D.D.C., Sept. 19, 1978), with the proposed regulations. In *Tacoma,* the court stated that the practice of the agency was to accept land in trust according to the following guidelines: (a) title to the land must be clear; (b) the proposed beneficial owner must be an enrolled member of a tribe; (c) the land must be within the boundaries of

the tribal reservation of which the proposed beneficiary is a member; (d) if the proposed beneficiary is not a member of the tribe for whom the reservation was established, the Tribal Council is to be notified of the requested transfer prior to its approval. Br. in Oppos. at 4a.

The focal section of the proposed regulations, § 120a.3, ("land acquisition policy"), incorporates these same standards without significant elaboration or clarification. For example, § 120a.3(b) provides:

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, "land" may be acquired by or for an "individual Indian" in a "trust or restricted status" when the "land" is located within the exterior boundaries of an "Indian Reservation", or adjacent thereto, or when the "land" is already in a "trust or restricted status".

Similarly, § 120a.12 requires that title to the land be clear, and § 120a.2(c) defines "individual Indian", in part, as an enrolled member of a tribe.

Thus, Respondent's statement that "the standards which defendants ask to be reviewed likely apply to very few official actions and only past ones", (Br. in Oppos. at 4), is patently incorrect. To the contrary, even assuming the proposed regulations are eventually promulgated, the similarity between the proposed regulations and the standards currently in use is so great as to constitute an unbroken line of consistent agency policy. Any decision regarding those standards, including the holding of the court below, and more importantly, the decision of this Court should certiorari be granted, will thus have wide-ranging effects on land

acquisition pursuant to § 465 even under the proposed regulations.

Respondent's argument is defective for another reason as well. The proposed regulations themselves require that all land acquisitions are "[s]ubject to the provisions contained in the acts of Congress which authorize land acquisitions. . . ." § 120a.3(b). This limiting clause is significant for two reasons: first, it indicates that the regulations are not exclusively limited to acquisitions made under § 465, but instead, are intended as broad guidelines to be tailored to the requirements of the particular statutory authority invoked; and, second, the regulations provide that any limitations contained in the authorizing statute itself must be regarded as limiting the policy guidelines in the regulations.

Respondent's argument that the proposed regulations will eliminate conflicts over land acquisition is thus without foundation, since those regulations do not even purport to address the specific question of the scope of § 465. Those regulations ignore the fundamental issue in the present case: whether, as Petitioners argue is required by the legislative history of § 465, the needs and landholdings of an individual Indian should be considered when a request is made for trust acquisition under § 465.

III. RESPONDENT'S CHARACTERIZATION OF THE JURISDICTIONAL ISSUE IS INCORRECT.

Petitioners have strongly and extensively argued that the court below erred in holding that Respondent stated a cause of action under 42 U.S.C. § 1983. Pet. at 23-34. Respondent's only reply to this controversial issue, however, is to state that the Court of Appeals was cor-

rect in its interpretation of § 1983. Br. in Oppos. at 7. The string citation following Respondent's terse statement contains cases which, as Respondent concedes, (Br. in Oppos. at 6), were exhaustively discussed in the Petition, and, Petitioners maintain, were adequately distinguished from the present case.

Respondent further argues that the court below had jurisdiction because of the existence of an Equal Protection claim that was not "completely devoid of merit". Br. in Oppos. at 7. Respondent fails to note, however, that the only reference by the court below to the Equal Protection claim was a footnote recognizing that Respondent did not present "a prima facie case of racial discrimination or of denial of a 'fundamental right' . . . ." Pet. at 11a, n. 8. In fact, the court below premised its holding on the existence of a valid cause of action under § 1983, based on the alleged denial of Respondent's rights under § 465. Pet. at 7a-8a.

It is thus unquestionably clear that the court below did not "proceed to decide the Supremacy Clause claim and to address it before the constitutional claim", as Respondent maintains. Br. in Oppos. at 7. Respondent is, in effect, imputing to the court below an analysis it did not apply. That attempt should not be allowed to cloud the significance of the genuine jurisdictional issue raised by Petitioners, that is, whether Respondent stated a cause of action under § 1983.[2]

[2] In fact, Respondent would have this Court ignore the Court of Appeals' ruling that § 1983 creates a cause of action for violations of rights conferred by 25 U.S.C. § 465. Pet. at 7a-8a. By arguing that the court below had jurisdiction to decide the merits of the claim, Respondent diverts attention from the precise holding of the court, and attempts to defend the court's actions on a ground which was not relied upon by the Court of Appeals.

IV. RELIANCE BY RESPONDENT ON A RECENT DISTRICT COURT OPINION IS MISPLACED.

In support of the interpretation of 25 U.S.C. § 465 by the Court of Appeals in this case, Respondent relies on the opinion of a Federal district court, *City of Tacoma* v. *Andrus,* No. 77-1423 (D.D.C., Sept. 19, 1978), and this Court's interpretation of 25 U.S.C. § 412a, in *Board of Commissioners* v. *Seber,* 318 U.S. 705 (1943). Br. in Oppos. at 5. As the analysis of the court below and the inapplicability of the *Seber* opinion have been fully discussed by Petitioners, (Pet. at 19-23), only the *City of Tacoma* opinion will be examined at this point.[3]

As a preliminary matter, it should be noted that the court in *City of Tacoma* intently reiterated that its holding was limited to the four specific tracts at issue in that case. Br. in Oppos. at 3a, 7a. The court's disclaimer of any intent to prescribe a comprehensive definition of § 465 thus indicates that any statements in the opinion relating to the parameters of the Secretary's authority under § 465 are in the nature of *dicta,*

[3] It is interesting to note the conspicuous absence of the § 465 analysis by the court below in Judge Gerhard Gesell's opinion of September 19, 1978, in *City of Tacoma.* The Court of Appeals opinion in this case was not cited in *City of Tacoma* even though it was filed on April 5, 1978, and a copy of the opinion was sent to Judge Gesell on April 24, 1978, by counsel for the intervening defendant in the *Tacoma* case. In fact, the only cases relied upon by Judge Gesell in specific support of his sweeping interpretation of § 465 were *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), and *Stevens* v. *Commissioner,* 452 F.2d 741 (9th Cir. 1971). Br. in Oppos. at 8a. These cases were cited to indicate court approval of trust acquisitions for Indians "in no sense incapable of self-support." *Id.* It is sufficient at this juncture to note that in neither case was an argument of the nature raised by Petitioners in this Court argued by the parties in those cases.

and relevant only in the context of the particular factual situations before the court. The brevity of the court's examination of the legislative history of § 465 may thus be explained as following from the court's reticence to articulate a general standard applicable to § 465 takings.

The court relies on various statements by one sponsor of the Indian Reorganization Act, Representative Howard, to support its conclusions concerning intended beneficiaries under § 465. There are essentially two problems in this part of the court's analysis. First, the statements form part of a comprehensive address by Representative Howard relating to the Indian Reorganization Act in its entirety, and it was in the specific context of explaining the adverse effects of the federal allotment policy that the particular remarks cited in the *Tacoma* opinion were made. Br. in Oppos. at 8a. Those remarks were actually part of a historical chronicle of events preceding the Indian Reorganization Act, and thus, were not related to the specific provisions of the Act. Similarly, the court quotes Representative Howard as defining the purpose of the Act as " 'build-[ing] up Indian landholdings until there is sufficient land for all Indians who will beneficially use it.' *Id.* [78 Cong. Rec.] at 11732." Br. in Oppos. at 8a. This statement, another in the same series of remarks by Representative Howard, is itself ambiguous, since it was intended as a characterization of the bill's purpose as a whole, and in no way detracts from Petitioners' position that § 465 was directed toward providing land for those Indians whose *needs* were such as to place them within the purview of § 465.[4]

[4] This summary of the goal of the Act by Representative Howard was cited by the court in *Tacoma* despite the numerous specific references to section 5 of the Act in the legislative history. *See* Pet. at 12-19. It was only in its January 20, 1978, Memorandum Opinion that the court referred to specific references in the legislative history to § 465. Pet. at 39a. It was perhaps this difference in focus which led the court to its precise interpretation of the statute on January 20, 1978, and its expansive and sweeping one on September 19, 1978.

Second, the court in *Tacoma* cites S. Rep. No. 1080, 73d Cong. 2d Sess. (1934), in support of its conclusions, when in fact, the Report is far more consistent with the construction of the Act offered by Petitioners. For example, the Report states:

> The purposes of the bill, briefly stated, are as follows:
>
> * * * * * *
>
> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.

Id. at 1. The Report specifically characterizes § 465 as follows:

> To meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support, section 5 of the bill authorizes the purchase of lands by the Secretary of the Interior, title to be vested in the United States in trust for the Indian tribe for which the land is acquired. There is authorized to be appropriated not to exceed $2,000,000 in any one fiscal year for such purchase of land.

Id. at 2.

Additionally, Judge Gesell attached importance to the fact that § 465 authorizes relinquishment as one of the enumerated means of land acquisition under the

statute. Br. in Oppos. at 8a. Analysis of the court's statements, however, reveals that its reliance on the term is misplaced because the term was inappropriately construed on a literal level only, when in fact the term relinquishment is not subject to such summary interpretation.

In essence, the court in *Tacoma* implied that "relinquishment" is a term of art in the sense that it is to be given a uniform meaning regardless of the context in which it is used. That manner of interpretation is erroneous, however, as is revealed by examination of the other statutes in which it appears. As relevant here, "relinquishment" appears in 25 U.S.C. §§ 350 and 408.[5] Examination of these statutes reveals that relinquishment is in fact a general term, meaning nothing beyond a formal surrender of all interests in land. Rather than being a term of art, therefore, "relinquishment" is more properly considered a general term whose meaning is to be determined by reference to the particular context in which it is used.

Unlike Judge Gesell's interpretation, therefore, "relinquishment" must be defined by consideration of the purposes of § 465. The most reasonable interpretation, and one consonant with the legislative history of § 465, is that "relinquishment" in fact refers to the surrender by an allottee of his interest in an allotment for the benefit of his tribe, or another individual. The term is most reasonably construed as applying only to allot-

[5] Sec. 305 allows surrender and cancellation of patents in exchange for selection of new allotments; § 408 allows surrender of an allotment for the benefit of the allottee's children. Neither section allows surrender of legal title by an individual Indian in exchange for retention of the beneficial interest by the same individual.

ments because relinquishment was the sole means by which allotments could be transferred, since the inalienable status of the land prohibited transfer by any of the other means enumerated in § 465.

This interpretation is supported by the legislative history of § 465. As originally drafted, section 5, appearing as section 7 of Title III of the original bill, S. 2755, contained a separate clause relating exclusively to relinquishment. Section 7 provided in relevant part:

> The Secretary is authorized, in the case of trust or restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel, the patent or patents or any other instrument removing restrictions from the land.

That section, which explicitly allowed surrender of fee patents by individual Indians in exchange for retention of a beneficial interest in the land, was deleted from the final version of § 465. Thus, "relinquishment" in the sense used by the court in *Tacoma* was removed from the Act, and nowhere in the legislative history is there any indication that the deleted clause was to be impliedly incorporated into the Act itself.

As noted *supra,* the most reasonable interpretation to be gleaned from the legislative history of § 465 is that relinquishment was intended to mean the voluntary surrender of all interest in land by an individual allottee, for the benefit of a third party. The interpretation of the term by the court in *Tacoma* thus must be recognized as erroneous, because it is inconsistent with the legislative history and purposes of § 465.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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